IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

FAO.No. 306 OF 2007()

AGAINST THE ORDER DATED 25/07/2007 IN IA 1154/07 IN
OS.164/2007 OF ADDL.SUB COURT, PALAKKAD

APPELLANTS/RESPTS. 3 AND 4/DEFTS. 9 AND 10.

1. INDIRA, W/O SUVARNAKUMAR.

2. SUGUNA, W/O DEVARAJAN,
BOTH ARE RESIDING AT KUPPIYODE VEEDU,
MARUTHARODE P.O., PALAKKAD.

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON
SRI.JIBU P THOMAS
SRI.P.S.APPU

RESPONDENTS: PETITIONER/RESPTS. 1 AND 2/PLAINTIFF/DEFTS 3 & 4

1. JALAJA @ JALAJA KUMARI,
W/O MOHANDAS, RESIDING AT MELEPURA VEEDU,
KANNANUR, PALAKKAD.

2. SURNAKUMAR, S/O DAMODARAN,
RESIDING AT KUPPIYODE VEEDU,
MARUTHARODE P.O., PALAKKAD.

3. DEVARAJAN, S/O DAMODARAN,
RESIDING AT KUPPIYODE VEEDU,
MARUTHARODE P.O., PALAKKAD.

BY ADV. SRI.T.C.MOHANDAS
SRI.T.M.SUNIL
SMT.S.CHITHRA
SRI.A.S.BRIJESH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 18/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.

F.A.O. NO. 306 OF 2007

DATED THIS, THE 18TH DAY OF DECEMBER, 2007.

J U D G M E N T

Raman, J.

This is an appeal arising from an order of injunction passed against the appellants herein, in I.A.1154/2007 in O.S. 164/2007 on the file of the Sub Court (Additional), Palakkad.

2. The suit is one for partition instituted by the first respondent herein. Plaint schedule consists of 25 items of property. The present injunction order is confined to items 1 to 13. In respect of items 14 to 25, the appellant herself undertook not to alienate or encumber the property during the pendency of the suit. In respect of Items 1 to 13, the appellants set up an independent claim based on Exts.A1 and A2 registered sale deeds executed in their favour by the Power of Attorney Holder Thanka. Admittedly, Items 1 to 13 originally belonged to Thanka. There is also no dispute that the plaintiff and defendants are legal heirs of Thanka. According to the appellants, based on Exts.A1 and A2 sale deeds they were in continuous possession of the same and they produced the tax receipts

Exts.A3 to A10 in support of the said contention. The court below found that Exts.A3 to A10 would show that respondents 3 and 4 (who are the appellants herein) have paid basic tax in respect of land situated in Marutharode Village and those payments were made on the basis of Exts. A1 and A2 documents of the year 1996. According to the appellants, they have raised a specific contention claiming exclusive right over items 1 to 13 and a written statement has already been filed as early as in June, 2007. Despite the specific contention so raised, the plaintiff did not seek to challenge the sale deeds Exts.A1 and A2 either by amending the plaint or filing any rejoinder. According to them, they have entered into an agreement for sale in respect of 2 $^{1/2}$ acres of land out of items 1 to 13. Though such a contention was raised in the counter affidavit filed in the injunction application, admittedly no such sale deed was also produced before the court below.

However, the court below found that Exts.A1 and A2 documents were executed by the power of attorney holders of Thanka who died two months after Exts.A1 and A2 and that the power of attorney holders themselves are the husbands of the appellants and grandsons of Thanka. If as a matter of fact, Thanka thought it fit to assign the properties to the appellants, nothing prevented her from executing the power of attorney in their names itself.

These facts were weighed with the court in granting injunction and it observed that the validity of Exts. A1 and A2 documents is a fact to be decided after taking evidence. But whether the validity of Exts.A1 and A2 documents would arise for consideration in the light of the pleadings of the parties has, however, not been taken notice of by the court below. It is true that in a suit for partition, those items in respect of which no independent claim is raised has necessarily to be preserved until final decision since a co-owner cannot be permitted to defeat the right of the others by inducting third parties. So however, if exclusive right is claimed in respect of any item of property sought to be partitioned, the court below has to find a prima facie case in favour of the petitioner seeking injunction. In that regard, the court below has necessarily to consider when Exts.A1 and A2 are registered sale deeds, a presumption may arise in favour of the assignees. So however, if there are sufficient evidence to raise a suspicion in the manner in which such sale deed is executed, it is certainly open to the court below to assess such materials also so as to preserve the right of the parties. But as already observed above, the question as to the validity of Exts.A1 and A2 whether would arise for consideration on the basis of the pleadings raised by the parties, on which the court below did not refer to the contention of the plaintiff and defendants in this regard. Further, even

though the court below has stated that there is no case for the appellants of any urgent need for money or that they want to construct a house thereon, a contention is raised in the counter affidavit by the appellants that they have entered into an agreement regarding 2 $^{1/2}$ acres of property from Items 1 to 13. Therefore, in respect of $2^{1/2}$ acres in items 1 to 13 is concerned, the court below has to consider whether there is any truth or otherwise in the statement made by the appellants that there is an agreement for sale. True that the appellants have not produced any such document before the court below. But the court below did not reject the contention on that ground.

On a totality of the facts and circumstances of the case, we feel that the matter requires a second look. The matter is remanded to the court below to consider with reference to the pleadings in the case as to whether the validity of Exts.A1 and A2 will arise for consideration in the suit and if so, whether there is any prima facie case to hold that those documents are sham or that no right passed under Exts.A1 and A2 for any valid reason. Both sides are given opportunity to adduce additional evidence, if any, in this regard and the court below will pass fresh orders. Until fresh orders are passed by the court below, status quo as on today shall be maintained and the appellants shall not alienate, encumber or commit any waste in Items 1 to 13 till then. Thereafter, the right should be determined in accordance

with any orders that may be passed by the court below.

We also make it clear that any of the observations made above shall not adversely affect the right of the parties in determining the question by the court below in accordance with law based on the materials produced. The Interlocutory Application shall be disposed of expeditiously, at any rate, within a period of two months.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-